Fair Labor Standards Act Overview

The Elon University School of Law Residency Program satisfies Fair Labor Standards Act (FLSA) requirements regarding classification of students as interns because the Residency Program meets the factors of the primary beneficiary test set out in recent opinions of the U.S. Court of Appeals. The U.S. Courts of Appeals for the 11th and 2d Circuits laid out a set of 7 non-exhaustive factors (hereinafter "*Glatt* Test") to determine whether an internship is of primary benefit to the employer or to the student trainee. These courts argue the *Glatt* Test is a better presentation of the factors used in *Walling v. Portland Terminal, Inc.*, the seminal 1947 Supreme Court case, that classified the difference between trainees and workers under the FLSA. Arguably, there is some tension between the *Glatt* Test and the 6-factor test (hereinafter "DOL Test") issued by the U. S. Dept. of Labor (USDOL) in its fact sheet for employers. The USDOL argues the DOL Test is also based on the factors of *Portland Terminal*. The U.S. Court of Appeals for the 4th Circuit held that it must determine whether the employee or the employer is the primary beneficiary of the trainee's labor through a fact intensive analysis. Elon Law relies on the *Glatt* Test, adopted by the 2nd Circuit and the 11th Circuit, to provide a sound framework for the permissibility on unpaid interns in its Residency Program.

Glatt v. Fox Searchlight Pictures, Inc. (2nd Circuit)

On July 2, 2015, the 2nd Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*, disrupted the status quo by adopting a primary beneficiary test, instead of following the DOL Test. Known to many for its connection to the film *Black Swan*, the plaintiffs were unpaid interns claiming compensation as employees under the FLSA. 791 F. 3d 376, 378 (2d Cir.2015). The 2d Circuit instructed, "that the proper question is whether the intern of the employer is the primary beneficiary of the relationship." *Id.* The *Glatt* Test is "a set of [7] non-exhaustive factors to aid courts in determining whether a worker is an employee for purposes of the FSLA." *Id. at 384*. The *Glatt* Test "focuses on what an intern receives in exchange for [her] work" while also providing "courts the flexibility to examine the economic reality as it exists between the intern and the employer." The 7 non-exhaustive factors are defined as follows:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee – and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship us tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship the intern with beneficial learning.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Id.

On September 11, 2015, the 11th Circuit adopted the *Glatt* Test established by the 2d Circuit in *Schumann v. Collier Anesthesia, P.A.* 803 F. 3d 1199 (11th 2015). Plaintiffs in the case were "former student registered nurse anesthetists . . . who attended a master's degree program" and who "sought to recover unpaid wages and overtime . . .for their [degree program's] clinical hours." *Id.* at 1202.

DOL Test

Prior to establishment of the *Glatt* Test, the DOL Test distilled from *Portland Terminal* served as the best guidance to employers. The FLSA defines "employ" as "to suffer or permit to work." 29 U.S.C. § 203(g). FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," and defines "employee" as "any individual employed by an employer." 29 U.S.C. §§ 203 (d), (e) (1). These definitions do not provide much guidance toward the issue of internships and the status of interns. However, the USDOL's Fact Sheet #71 has served as a resource for employers when it comes to internship programs. DOL, Wage & Hour Div., Fact Sheet #71, Internship Programs Under The Fair Labor Standards Act (April 2010), available at http://www.dol.gov/whd/regs/compliance/whdfs71.pdf.

In order to avoid classifying interns as employees, the DOL's Fact Sheet #71 provides a test for defining unpaid interns. *Id.* The DOL Test distilled from *Portland Terminal* are listed as follows:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

2. The internship experience is for the benefit of the intern;

3. The intern does not displace regular employees, but works under close supervision of existing staff;

4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

DOL, Wage & Hour Div., Fact Sheet #71, Internship Programs Under The Fair Labor Standards Act (April 2010), available at http://www.dol.gov/whd/regs/compliance/whdfs71.pdf. All factors must be met in order to ensure that an employment relationship does not exist under the FSLA. *Id.*